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BULLETIN NO. 2001-11

September 14, 2001


TO: ALL HOLDERS AND SERVICERS

**SUBJ: ATTORNEY AND TRUSTEE'S FEE AND OTHER
LIQUIDATION EXPENSES**

Purpose

This circular provides current guidance in three areas: (1) Legal Services and Trustee's fees; (2) Bankruptcy release fees; and (3) Advances for taxes and insurance premiums included in claims under loan guaranty.

Legal Services and Trustee's Fees

a. Background: VA has established by regulation the types and maximum fees payable for legal services in connection with termination of a borrower's interest in the security for a VA-guaranteed loan. Title 38, CFR 36.4313(b)(4) and (5) advise that reasonable expenses for trustee's fees or commissions, or for legal services, may be included in the computation of a claim under the guaranty subject to a maximum combined total of \$850. VA does not attempt to establish any mum or maximum for the amount of the fee an attorney may charge a client. However, the regulation does allow VA to establish the maximum amount that will be reimbursed in a claim under guaranty. VA has traditionally established reasonableness of fees in advance, with Regional Loan Centers (RLCs) periodically issuing bulletins describing maximum allowable fees for their areas of jurisdiction. VA often reviews fees allowed by HUD (Department of Housing and Urban Development), Fannie Mae (Federal National Mortgage Association), and others when establishing reasonableness, and several RLCs have recently increased local allowables based on recent changes in the Fannie Mae schedule. However, the \$850 regulatory maximum has prevented matches with Fannie Mae in some areas, even though increases seemed appropriate.

b. Scope of Legal Services: VA has traditionally held that its regulations do not contemplate payment by the borrower of attorney fees for the collection of a delinquent loan. Such fees are allowable only if the default is so great as to allow actual referral for termination, following the expiration of a notice of intention to foreclose provided to VA. In that case a reasonable portion of the maximum allowable fee may be charged to the borrower for that part of the procedural work completed at the time of reinstatement. In cases where a loan termination is completed, the maximum allowable fee may be included when submitting a claim under loan guaranty. The fee for reasonable trustee's fees and/or legal services actually performed will naturally include some administrative or procedural actions in that fee, but should not include work which is not associated with the trustee's or attorney's direct action to terminate the security for the loan. Such work may be handled by the trustee or attorney at the loan holder's request, but must not be included as part of the bill for trustee's or attorney fees submitted with the guaranty claim. Such work may include, but is not limited to the following.

(1) Work not of a Legal Nature: Some servicers have experienced difficulty in managing the termination workflow, especially with respect to ordering liquidation appraisals in a timely manner. They have asked, and attorneys have agreed to handle ordering of liquidation appraisals through VA. Some servicers have experienced similar difficulties in timely providing VA with the status of loan accounts about to be terminated. Some servicers have arranged with attorneys to provide this data directly to VA, rather than the servicer simply adding the attorney's fee and expenses to its calculated payoff and providing that information to VA. While we recognize that these practices are helpful to a servicer, VA does not consider this work of a legal nature to be part of the reasonable attorney/trustee's fees included in a claim under loan guaranty.

(2) Expenses due to Required System Use: VA understands that many servicers utilize electronic billing entities to help their processing and payment of invoices. When an attorney/trustee is required to pay a fee to participate in such a system, we find no basis for including such a cost in the attorney/trustee's fees submitted with the claim under loan guaranty. The benefit of such a system should be twofold: first, to the servicer to help it better manage its bills and disbursements, and second, to the attorney/trustee who may reasonably expect prompt payment of invoices. Because there is no benefit to VA, and such a fee is not for actual legal services, it should not be included in any manner in the bill submitted with the claim under loan guaranty.

(3) Correction of Servicer Deficiencies: During the course of processing loan terminations, attorneys or trustees may discover erroneous or missing legal documents, or other obstacles to completing termination. It appears appropriate for attorneys to be reimbursed for additional work to overcome such obstacles (subject to whatever billing arrangements have been made). However, it is not appropriate for VA to bear any burden resulting from a current or former loan holder's failures to obtain and maintain a lien of proper dignity, and thereby ensure ease of termination. VA may establish a cutoff date under 38 CFR 36.4319(f) if such an obstacle delays termination beyond the normal time frame. In addition, VA will not allow the expense of any efforts required to overcome the obstacle in the bill for attorney/trustee's fees submitted with the guaranty claim.

(4) Loss Mitigation Efforts: Many attorneys/trustees find themselves in the position of receiving contacts from borrowers who previously failed to respond to outreach efforts by loan servicers. Upon receipt of legal notice of termination, those borrowers may finally realize the seriousness of their situations and be ready to explore alternatives to foreclosure. While VA recognizes that attorneys/trustees are fully qualified to counsel borrowers about alternatives to foreclosure, we also believe that such counseling is the primary responsibility of the loan holder and its servicer. If the servicer allows the attorney or trustee to perform this function, it would seem appropriate for the servicer to provide reasonable remuneration, especially if the loan reinstates and the termination fee is not payable. However, if the loss mitigation efforts by the attorney/trustee are not successful and the loan is terminated, remuneration for such efforts will not be appropriate for inclusion in the bill for attorney or trustee's fees. In neither case will VA allow reimbursement for an attorney/trustee bill for loss mitigation efforts. Because of this position, servicers may prefer instead to have attorneys/trustees refer any loss mitigation inquiries back to the servicer for development.

c. Increase in VA Attorney/Trustee Allowances: VA is certainly interested in ensuring that insolubly delinquent loans are promptly terminated. Loan servicers also should be interested in ensuring prompt termination in order to avoid additional pass-throughs of corporate funds while awaiting termination. The last increase in the maximum VA attorney/trustee's fees became effective October 24, 1994, a few years after it was initiated. The cost of living has certainly increased since that time, and the present economic situation has caused labor shortages in many areas, including a shortage of qualified attorneys in some areas. In addition, some States have revised foreclosure laws, while on a national level the Fair Debt Collection Practices Act became effective for attorneys after the last change in the VA maximum was proposed. In recognition of the true increase in actual

attorney requirements and costs, VA is again initiating a change to its regulations to increase the maximum amount allowable for attorney/trustee's fees. Unfortunately, VA will not be able to pay more than the existing maximum of \$850 (or lower local maximums) until the final regulation is effective, which may take quite a while for the regulatory review process to be completed.

Bankruptcy Release Expenses

a. Background: For many years VA did not reimburse holders for any attorney or other expenses incurred to protect their interests during bankruptcy proceedings. That policy was developed during a time when bankruptcy filings were infrequent, and often led to reinstatement through successful completion of chapter 13 plans. However, during more recent times, bankruptcy filings have increased throughout the nation, and in some cases those filings have been used primarily to delay pending foreclosure actions. A number of years ago VA reviewed the regulations and determined that 38 CFR 36.4313(3), which allows other expenses of collecting debts or liquidating security, could serve as a basis for allowing some type of reimbursement for attorney and other expenses incurred in obtaining relief from bankruptcy courts. VA decided to allow actual filing fees and an attorney fee of \$50 (later increased to \$100) per court appearance required in obtaining bankruptcy relief prior to loan liquidation.

b. Increase in Bankruptcy Release Expense Allowables: The increase in the number of bankruptcy filings, and multiple filings, is continuing. VA believes that 38 CFR 36.4313(3) still allows us to reimburse reasonable expenses of collecting debts or liquidating security, and that we can revise amounts allowed, as was previously done, to more closely cover actual expenses. In order to alleviate any concerns about the amounts VA will allow, we will promulgate a change to the regulations specifically stating that bankruptcy release fees are reimbursable. The change will either list the maximum payable in the regulation, or provide for notice of increases in the maximum to become effective upon publishing appropriate notice in the Federal Register, similar to notices about changes in the net value percentage. Because the change will be published as a proposed rule, it will allow for comment from the public before final enactment. In the interim, effective with bankruptcy cases completed on or after October 1, 2001, VA will allow up to \$450 for obtaining relief from a Chapter 7 Bankruptcy, and up to \$650 for relief from Chapter 11 or Chapter 13 Bankruptcies, as well as actual filing fees. In the event of multiple bankruptcy filings immediately preceding loan termination, VA will allow up to \$250 for each additional release obtained.

Allowance for Advances

a. Background: Title 38 CFR 36.4313(a) provides that a holder may include advances for tax or insurance premium payments in the eligible indebtedness reported to VA. Another regulation, 38 CFR 36.4319(f), provides that VA may establish a cutoff date beyond which no further charges may be included in the computation of the account indebtedness. If an advance is made after a 38 CFR 36.4319f cutoff date, then VA usually disallows the advance in its entirety, or, in an effort to be fair, prorates the advance based on the type of advance and period impacted by the advance. For the most part, insurance premiums paid prior to a cutoff date have been allowed in their entirety, except for high-risk coverage, which has always been prorated to the termination date. VA also has had a policy of paying only the guaranteed portion of prorated high-risk premiums, which has further reduced allowable amounts. Taxes have generally been prorated as of a cutoff date, but there have been many differences of opinion between VA and servicers as to how much should be allowed. This is due to the fact that some taxes are paid in arrears, others are paid in advance, and VA requires payment of taxes due within 30 days of a conveyance of property to VA.

b. New Policy on Advances for Insurance: VA will continue to prorate high-risk insurance premiums and only allow amounts applicable prior to a cutoff or termination date. However, VA will no longer apply the guaranty percentage to those amounts, but will include them in the total

eligible indebtedness. For other than high-risk premiums, VA will allow advances made prior to a cutoff or termination date. Advances for any insurance premiums made after the cutoff or termination date will be disallowed.

c. New Policy on Advances for Taxes: For advances made for tax payments, VA will allow all such advances made prior to the cutoff or termination date, without proration. When the property is conveyed to VA, advances made for tax payments after the cutoff or termination will be allowed in their entirety. This policy is being established to encourage servicers to ensure that all taxes are paid when properties are conveyed to VA. When properties are not conveyed to VA (e.g., third party bids or no-bids), or are reconveyed by VA, advances made for tax payments after the cutoff or termination will be disallowed when computing the claim payable under loan guaranty.

d. Tax Recovery on Conveyed Properties: VA has recently contracted for tax service on its REO (Real Estate Owned). A tax search is completed shortly after conveyance to be sure that all taxes are paid up to date. When the tax search reveals delinquent taxes, penalties and/or interest due, the contractor will notify VA's Portfolio Loan Oversight Unit (PLOU), which is responsible for auditing the contractor's performance. If the PLOU determines that the delinquent tax, penalty and/or interest is the responsibility of the former VA-guaranteed loan servicer, a Bill Of Collection (BOC) will be submitted to the servicer. If the BOC is not promptly paid, then future amounts payable to the servicer will be offset to recover the amount of the BOC.

Questions and Comments

Please E-mail questions and comments concerning this bulletin to LGYHGALE@VBA.VA.GOV.

Rescission

This bulletin rescinds April 1, 2003.

A black rectangular box containing a white, handwritten signature that appears to read "F. M. McREAKEN".

F. M. McREAKEN
Loan Guaranty Officer